STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2010
v	No. 288630 Jackson Circuit Court
EDWARD DEVON OLIVER, Defendant-Appellant.	LC No. 08-003764-FC

Before: K. F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced to 10 to 30 years' imprisonment for the armed robbery conviction, and 23 to 120 months' imprisonment for the assault with intent to do great bodily harm less than murder conviction, with credit for 232 days. The two sentences are to run concurrently. Defendant appeals of right and we affirm.

Defendant argues that the trial court erred in refusing to instruct the jury on unarmed robbery, MCL 750.530. He contends that unarmed robbery is a necessarily included lesser offense of armed robbery and evidence was presented in this case which supported a conviction of unarmed robbery. We review de novo claims of instructional error. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). However, we review for an abuse of discretion a trial court's determination that a jury instruction is not applicable to the facts of the case. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). Importantly, "[t]he right to a properly instructed jury is fundamental to the right to receive a fair trial." *People v Embree*, 68 Mich App 40, 44; 241 NW2d 753 (1976).

All of the elements of a necessarily included lesser offense are contained in a greater offense. *People v Walls*, 265 Mich App 642, 645; 697 NW2d 535 (2005). However, the greater offense contains at least one element that the necessarily included lesser offense does not. *Id*. at 644. Therefore, if an instruction has been requested on a necessarily included lesser offense, the instruction is proper "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it." *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); *Walls*, 265 Mich App at 644. Moreover, if evidence has been presented in the case that supports a conviction of a lesser

included offense, the refusal to give the requested instruction is error requiring reversal. *People v Hendricks*, 446 Mich 435, 442; 521 NW2d 546 (1994).

Unarmed robbery is a necessarily included lesser offense of armed robbery. *People v Reese*, 466 Mich 440, 446-447; 647 NW2d 498 (2002). The element distinguishing unarmed robbery from the offense of armed robbery is the use of a weapon. *Id*. at 447. Thus, to find error requiring reversal, we must determine whether the evidence supported an instruction for unarmed robbery. Specifically, we must determine whether the facts surrounding the use of a knife were disputed and a rational view of the evidence would support an unarmed robbery instruction. *Id*.; *Walls*, 265 Mich App at 644. We conclude that a rational view of the evidence does not support defendant's assertion that the trial court incorrectly denied giving an unarmed robbery instruction. *Reese*, 466 Mich at 448. In this case, the jury was not only given an armed robbery instruction, but was also given an instruction for aiding and abetting, which included an instruction involving the natural and probable consequences of a crime. The law is clear that under the natural and probable consequences theory, there is criminal responsibility for anything that is fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it. *People v Robinson*, 475 Mich 1, 9; 715 NW2d 44 (2006).

Testimony at trial established that the victim did not see defendant with a knife. Defendant denied being armed with a knife, and asserted that he did not know that his codefendant was armed with a knife when he agreed to participate in the robbery. However, the undisputed evidence in this case reflects that the victim was stabbed repeatedly with a knife during the attack. Consequently, the evidence was clear that even if the jury believed that defendant did not possess the knife, his codefendant had to have possessed the knife as a knife was definitively used to injure the victim during the crime. In addition, the evidence supported beyond a reasonable doubt that under the facts, the armed robbery was the natural and probable consequence of the unarmed robbery. The undisputed evidence clearly established that defendant agreed to participate, and did participate, in an unarmed robbery. It was a natural and probable consequence of that crime that the robbery escalated into a violent affray, with codefendant brandishing a weapon on his own accord or in response to the victim's actions in trying to prevent the robbery. We conclude that a *rational* view of the evidence does not support the conclusion that the use of a deadly weapon was not a natural and probable consequence of the unarmed robbery such that defendant could be convicted of the lesser crime. *Reese*, 466 Mich at 447; *Walls*, 265 Mich App at 644. The trial court did not abuse its discretion in declining to instruct the jury on unarmed robbery.

Defendant also argues that the evidence was insufficient to support his conviction. We review de novo the question whether there was sufficient evidence to support the verdict by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). And, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

Defendant did not assert at trial nor does he assert on appeal that he did not commit an unarmed robbery. Rather, defendant solely argues that the evidence is insufficient to establish that he either had a weapon or knew that his codefendant intended to use a weapon during the robbery. We disagree.

In this case, there were three ways in which defendant could be convicted of armed robbery with regard to this disputed element. Defendant could be convicted of armed robbery if he used a deadly weapon, if he knew that the person he was assisting to commit the unarmed robbery had and intended to use a deadly weapon in the course of committing the unarmed robbery, or if defendant participated in or assisted in the commission of the unarmed robbery with another person and it was the natural and probable consequence of that crime that one of the perpetrators would utilize a deadly weapon during the commission of that crime. Even if there was no direct evidence and the jury believed that defendant was not armed with a knife and did not know that codefendant was armed with a knife and intended to use the knife when defendant agreed to participate in the robbery, the circumstantial evidence and the reasonable inferences arising therefrom were sufficient for a reasonable fact-finder to conclude that the use of a knife by codefendant was a natural and probable consequence of the unarmed robbery. *Plummer,* 229 Mich App at 299. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Herndon*, 246 Mich App at 415.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Brian K. Zahra